# Petition

81-1547

No.

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

---

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Petitioners,*

v.

JOSEPH WHEELER; CLARICE WHEELER; CLIFF DEVELOPMENT CORPORATION; and S & S BUILDERS, INC., an Alabama Corporation,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

JEROME A. COOPER
(Counsel of Record)
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

*Attorneys for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Whether the "finding" of the Court of Appeals that the tract of land permits construction of apartments is consistent with the teaching of this Court in *Euclid vs. Ambler Realty Company*.

2. Whether the defense of qualified immunity in a § 1983 action against a municipality should be abolished retroactively.

## LIST OF PARTIES

The following were parties to this proceeding in the Court of Appeals: Joseph Wheeler; Clarice Wheeler; Cliff Development Corporation; S & S Builders, Inc., an Alabama corporation; City of Pleasant Grove, a municipal corporation; Bobby Patrick, as Mayor of the City of Pleasant Grove; Hollis H Cain, as Chairman of the City Council of Pleasant Grove; Edward C. Capps, Joseph A. Cooper, Milton C. Russell, as members of the City Council of the City of Pleasant Grove; and James E. Medlock, as Building Inspection Officer of the City of Pleasant Grove.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES | 2 |
| STATEMENT OF THE CASE | 3 |
| A. Procedural Overview | 3 |
| B. The District Court's Opinion | 3 |
| 1. The Ordinances in General | 4 |
| C. The Court of Appeals' Decision | 4 |
| REASONS FOR GRANTING THE WRIT | 5 |
| Introduction | 5 |
| I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *VILLAGE OF EUCLID VS. AMBLER REALTY COMPANY* | 6 |
| II. THE DEFENSE OF QUALIFIED IMMUNITY IN § 1983 ACTION AGAINST A MUNICIPALITY SHOULD NOT BE ABOLISHED RETROACTIVELY | 6 |
| CONCLUSION | 7 |

TABLE OF CONTENTS—Continued

Page

APPENDIX

A. Opinion of the court of appeals ..... 1a
B. Decision of district court of Nov. 9, 1979 ..... 7a
C. Decision of district court of Apr. 15, 1980 ..... 19a
D. Decision of district court of Aug. 4, 1980 ..... 24a
E. Action of the court of appeals ..... 31a
F. Constitutional provisions and statutes ..... 33a

## TABLE OF AUTHORITIES

*Cases:* Page

*Linkletter vs. Walker*, 381 U.S. 618 (1965) ..... 7
*Monell vs. New York City Department of Social Services*, 436 U.S. 658 (1978) ..... 6
*Monroe vs. Pape*, 365 U.S. 167 (1961) ..... 6
*Owen vs. City of Independence*, 445 U.S. 622 (1980) ..... 3
*Village of Euclid vs. Ambler Realty Company*, 272 U.S. 365 (1926) ..... 5

*Constitutional Provisions and Statutes:*

U.S.C.A. Constitutional Amendment 14, Section 1.. 3
42 U.S.C. § 1983 ..... *passim*
28 U.S.C. § 2201 ..... 3
28 U.S.C. § 2202 ..... 3
42 U.S.C. § 1985 ..... 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

---

No.

---

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Petitioners,*

v.

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama Corporation,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

City of Pleasant Grove, a municipal corporation; Bobby Patrick, as Mayor of the City of Pleasant Grove; Hollis H. Cain, as Chairman of the City Council of Pleasant Grove; Edward C. Capps, Joseph A. Cooper, Milton C. Russell, as members of the City Council of the City of

Pleasant Grove; and James E. Medlock, as Building Inspection Officer of the City of Pleasant Grove, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Joseph Wheeler, et al., vs. City of Pleasant Grove, a municipal corporation, et al.*, entered on December 18, 1981.

## OPINIONS BELOW

The original opinion of the District Court is reprinted in the separate appendix hereto as App. B (5a-16a). Upon motion for reconsideration by plaintiffs, the District Court issued an additional opinion, which is reprinted in the separate appendix hereto as App. C (17a-23a).

While this case was on appeal in the Fifth Circuit, the District Court issued a supplemental decision, which is reprinted in the separate appendix hereto as App. D (24a-30a).

The opinion of the Court of Appeals—the decision from which certiorari is sought—is reprinted in the separate appendix hereto as App. A (1a-4a).

## JURISDICTION

The Court below entered judgment on December 18, 1981, App. A (1a). On January 21, 1982, the Clerk of the Eleventh Circuit extended the time for filing this petition to and including February 19, 1982, App. E (31a-32a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent parts of the Fourteenth Amendment to the United States Constitution; 42 U.S.C. § 1983; 28 U.S.C. §§ 2201 and 2202 are reprinted in Appendix F (33a).

## STATEMENT OF THE CASE

### A. Procedural Overview

Respondents brought suit against petitioners alleging violations of §§ 1983, 1985 of 42 U.S.C., and the Fourteenth Amendment to the Constitution of the United States. Respondents sought to redress the alleged wrongs pursuant to 28 U.S.C. §§ 2201 and 2202. Claims brought under 42 U.S.C. § 1985 were withdrawn by respondents. App. B (7a).

Judgment was entered in favor of respondents in that petitioners were enjoined from enforcement of a zoning ordinance which prohibited the construction of apartments and were further ordered to pay the sum of $5,000.00 as a reasonable attorney's fee.

On April 15, 1980, the District Court entered an order disallowing any award of damages against petitioners due to a finding that the elements of a defense had been proven under the doctrine of qualified immunity. App. C (23a). One day later, on April 16, 1980, the United States Supreme Court issued its decision in *Owen vs. City of Independence.* 445 U.S. 662 (1980). The Eleventh Circuit affirmed in part and reversed in part, and concluded that the application of the ordinance in question was unconstitutional—and that the case should be reversed (in light of *Owen vs. City of Independence*) and remanded for a determination of damages sustained by respondents. App. A (4a).

### B. The District Court's Opinion

The District Court entered extensive findings of fact detailing the possible interpretations of the zoning ordinances of the City of Pleasant Grove, and then proceeded to issue its own interpretation of said ordinances, which was in contradiction to the interpretation given by the City.

### 1. *The Ordinances in General*

This case presents a zoning dispute.

For many years, the City has operated under Ordinance No. 177, which contains conflicting language concerning the construction of apartments in a B-2 zone, which has always been the zone of the tract of land in question. Under Ordinance No. 177, all uses permitted in a R-3 zone, are permitted in a B-2 zone.

Elsewhere in the ordinance, multi-family uses are specifically allowed only in R-3 and B-1 zones. App. B (9a).

Respondents were granted a permit to construct apartments in a B-2 zone. However, appeals were taken from the issuance of this building permit, which stayed the operation of the permit under zoning Ordinance No. 177.

At a later date, the City adopted Ordinance No. 216, which prohibited the issuance of permits for the construction of apartments anywhere in the City.

Upon reconsideration, the District Court found that the city officials had acted in good faith in their belief that Ordinance No. 177 prohibited multi-family dwellings in a B-2 zone, App. C (21a), and that an award of damages should be disallowed due to a finding of the elements of a defense having been proven under the doctrine of qualified immunity. However, petitioners continued to be enjoined from interfering with the construction of the apartments in the B-2 zone.

### C. The Court of Appeal's Decision

The Eleventh Circuit affirmed the District Court's interpretation of Ordinance No. 177 in allowing the use of the tract in question for apartment complexes, and concluded ". . . we see no reason to disturb this finding under the clearly erroneous rule . . ." App. A (3a). However, the Court of Appeals reversed the District Court in light of *Owen vs. City of Independence, supra,*

which came down one day after the District Court's opinion upon reconsideration. App. A (3a-4a).

## REASONS FOR GRANTING THE WRIT

### Introduction

The Court below invalidated a section of the City's zoning ordinance which has been in effect since 1957. This decision has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision under Rule 17(a) of the Supreme Court Rules.

This Court has previously held in *Euclid vs. Ambler Realty Company*, 272 U.S. 365, as follows:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Supra, at* p. 388.

The validity of the legislative classifications for zoning purposes is fairly debatable in the instant case. Part of Ordinance No. 177 appears to permit the construction of apartments in a B-2 zone—whereas another part says that multi-family uses shall only be constructed in a R-3 and B-1 zone.

The decision below should be reviewed for another reason. This Court has not yet had occasion to indicate whether its precedent setting decision in *Owen vs. City of Independence, supra*, should be applied retroactively, or to have prospective effect only. Prior to *Owen*, and for many years, this Court has allowed municipalities a defense of immunity in § 1983 suits, where said officials acted in good faith. In two short years, municipalities have gone from absolute immunity under § 1983, to strict liability. This Court has created under *Owen* an entirely new rule in imposing financial liability on a city for acts which at the time performed had been perfectly valid under the law.

## I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *VILLAGE OF EUCLID vs. AMBLER REALTY COMPANY.*

In the instant case, both the District Court and the Court of Appeals have recognized that the City's long-standing zoning ordinance is subject to two interpretations as far as the construction of apartments or multi-use family dwellings are concerned in a B-2 zone.

In one part of the ordinance, multi-family uses are permitted only in R-3 and B-1 zones. In another part of the ordinance, uses permitted in R-3 and B-1 zones, are permitted in B-2 zones.

The above conflict as to the use in a B-2 zone, must be resolved by the legistlative branch of our government (in this case, the City Council) rather than the courts.

It is fairly debatable as to what is meant by the above conflicting language, and under such a set of circumstances, the United States Supreme Court in *Village of Euclid vs. Ambler Realty Company* has said that the legislative judgment must be allowed to control.

The District Court and the Court of Appeals should not "second guess" the legislature in the instant proceeding.

## II. THE DEFENSE OF QUALIFIED IMMUNITY IN § 1983 ACTION AGAINST A MUNICIPALITY SHOULD NOT BE ABOLISHED RETROACTIVELY.

In 1961, the United States Supreme Court in *Monroe vs. Pape*, 365 U.S. 167, held that local governments were not among the "persons" to whom 42 U.S.C. § 1983 applied, and were therefore wholly immune from suit under the statute.

In 1978, the Court issued *Monell vs. New York City Department of Social Services*, 436 U.S. 658, which overruled the holding in *Monroe*, but reserved decision as to

whether local governments should be afforded some form of official immunity in § 1983 suits.

In 1980, the Court held in *Owen vs. City of Independence, supra*, that a municipality had no immunity from liability under § 1983, and could not assert the good faith of its officers as a defense to such liability.

In the instant case, *Owen* simply should not be applied retroactively to acts which were lawful at the time committed.

After an extensive trial, the District Court in the instant case found that the city officials had acted in good faith, and detailed the reasons therefor.

In *Linkletter vs. Walker*, 381 U.S. 618, the Court held as follows:

> "Thus, the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective. And "there is much to be said in favor of such a rule for cases arising in the future."

We are simply asking the Court in the instant case to not allow *Owen* to be applied retroactively to this city for acts committed at the time as lawful and in good faith, and as so found by the District Court in App. C.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME A. COOPER
(Counsel of Record)
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576
*Attorneys for Petitioners*

# Appendix

## APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT *
UNIT B

No. 80-7306

JOSEPH WHEELER, *et al*,
*Plaintiffs-Appellants Cross Appellees*,

v.

CITY OF PLEASANT GROVE, a municipal corp., *et al.*,
*Defendants-Appellees Cross Appellants.*

Dec. 18, 1981

Appeals from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, HATCHETT and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

This action was brought under 42 U.S.C. §§ 1983, 1985, 28 U.S.C. §§2201-2202, and the fourteenth amendment of the United States Constitution. The plaintiffs sought declaratory, injunctive, and equitable relief as well as money damages from the City of Pleasant Grove and certain of its officers. The district court granted injunctive relief and attorney's fees to the plaintiffs, but denied any monetary damages. We affirm the district court's opinion, except that part dealing with the plaintiff's claim for damages. We reverse the court below on that issue and remand for further proceedings not inconsistent with this opinion.

---

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

The plaintiffs were granted a permit to build an apartment complex in Pleasant Grove, Alabama on August 8, 1978. This permit was issued under city Ordinance no. 177. The apartments were to be built on a parcel that had been recently purchased by the plaintiffs and had been zoned in classification B-2. In reliance on the permit, the plaintiffs initiated preparatory work.

The news of the construction of the apartment complex caused an uproar in Pleasant Grove. A referendum was held, which showed an overwhelming resistance to the proposed apartment complex. The upshot of this referendum was the passage of a new city Ordinance, no. 216, which forbade the construction of new apartments. The city then prohibited the plaintiffs from proceeding with the construction.

The district court held that the implementation of city Ordinance no. 216 was arbitrary and capricious, and was specifically intended to prevent the plaintiffs from exercising their building permit. As applied to the plaintiffs, Ordinance no. 216 was found to be a confiscatory measure and violative of the plaintiffs' fourteenth amendment rights to due process. Further, the ordinance bore no substantial relationship to legitimate concerns for health, safety, welfare, or the general well-being of the community. We agree.

This court perceives the enactment of Ordinance No. 216 to be a bald attempt to revoke an already authorized building permit. Findings by the trial court indicate that this action was a confiscatory measure. Under *Maher v. City of New Orleans*, 516 F.2d 1051, 1065, *rehearing denied*, 521 F.2d 815 (5th Cir. 1975), *cert. denied*, 426 U.S. 905, 96 S.Ct. 2225, 48 L.Ed.2d 830, if a regulatory undertaking is confiscatory in nature, it is a taking. Further, the city's purpose in enacting the measure was not rational. A developer has its right to be free of arbitrary or irrational zoning standards. *Arlington*

*Heights v. Metropolitan Housing Development*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 772 (1977). Additionally, if a zoning ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," it must be struck down, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). Given the findings of the court below, the application of city Ordinance No. 216 to the plaintiffs was unconstitutional.

The defendant claims that under the zoning ordinance in effect at the time the permit was issued (city Ordinance no. 177), the permit to construct the apartments should not have been granted. The ordinance in question was unclear on its face as to whether apartment complexes could be built in areas zoned as B-2. The court below considered the evidence on the issue and ruled that the proper interpretation of Ordinance no. 177 allowed the use of the tract in question for apartment complexes. We see no reason to disturb this finding under the clearly erroneous rule. Our review of the ordinance leads us to the same interpretation with respect to the permitted use of the tract for apartments in light of the evidence presented. Therefore, the plaintiffs had a legitimate permit under Ordinance no. 177.

The only remaining issue is that of damages. The district court held that the defendants in this action were shielded by the defense of a qualified immunity as set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The conclusion of the district court was reached without the benefit of the recently decided case of *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). In *Owen*, which came down at approximately the same time as the district court opinion, the Supreme Court distinguished the *Scheuer* case. It specifically stated that municipalities have no immunity in § 1983 actions, and

that good faith does not serve as a defense to liability.[1] We therefore reverse the district court's conclusion of law on this issue and remand for a determination of damages sustained by the plaintiffs.

AFFIRMED IN PART, IN PART REVERSED AND REMANDED.

---

[1] 445 U.S. at 638, 651, 100 S.Ct. at 1409, 1415 (1980). However, it should be noted that under *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) it appears that the city officials do have a "good faith" defense in § 1983 actions.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-G-1150-S

[Filed Nov. 9, 1979]

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama corporation,
*Plaintiffs,*

v.

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Defendants.*

### ORDER AND PERMANENT INJUNCTION

In conformity with and pursuant to the separate findings of fact and conclusions of law entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that judgment be and it hereby is entered in favor of plaintiffs and against the defendants in this cause; and it is

FURTHER ORDERED that plaintiffs shall be awarded the sum of $5,000.00 as a reasonable attorney's fee in this action; and it is

FURTHER ORDERED that the defendants be and the same hereby are ENJOINED from enforcement of

Ordinance 216, insofar as it would result in interference with the plaintiffs' rights under contract and under the building permit issued August 8, 1978.

It is FURTHER ORDERED that jurisdiction shall be and it hereby is RETAINED to prevent the further interference with the plaintiffs' rights under the building permit issued August 8, 1978, and under the contract.

DONE and ORDERED this 9th day of November 1979.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-G-1150-S

[Filed Nov. 9, 1979]

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama corporation,
*Plaintiffs,*

v.

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,
*Defendants.*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought under 42 U.S.C. §§ 1983, 1985, and the fourteenth amendment of the Constitution of the United States. Plaintiffs seek declaratory, injunctive, and pecuniary relief, pursuant to 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek to redress the alleged deprivation of their rights, privileges and immunities, as secured by the Constitution of the United States, without due process of law. Claims brought under 42 U.S.C. § 1985 and those seeking to assert a cause of action against individual defendants were withdrawn by the plaintiffs and stricken by order of this court. Plaintiffs' demand for a trial by jury was withdrawn. By consent of the parties, the case was tried to the court and taken

under submission. Plaintiffs' subsequent motion to amend pleadings to conform to the evidence was denied. After mature consideration, the court is of the opinion that judgment is due the plaintiffs in this action. In support of this conclusion, the court enters the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Plaintiffs, Cliff Development Corporation (Cliff) and S & S Builders, Inc. (S & S), entered into a contract to purchase from the plaintiffs, Joseph Wheeler and Clarice Wheeler, a parcel of real estate located in the defendant City of Pleasant Grove, in Jefferson County, Alabama.

2. Pursuant to the contract executed between the plaintiffs, S & S and Cliff applied for a building permit with the defendant City which was approved by the City Planning Commission on August 8, 1978, in compliance with defendant's zoning ordinances and in particular Ordinance No. 177 and its special use regulations.

3. S & S and Cliff sought the permit to build a large apartment complex of some greater than 100 units. In the process of obtaining the building permit, No. 1784, plaintiffs' plans were submitted to and approved by the City Planning Commission.

4. In reliance upon this permit, S & S and Cliff have initiated preparatory work, incurring excavation and other expenses.

5. After some considerable community disquietude, a referendum was held showing overwhelming dislike for the apartment complex proposed to be built. Ordinance 177 was amended on October 16, 1978, by the adoption of Ordinance 216.

6. Ordinance 216, in the nature of an "exclusionary zoning" measure, prohibits the issuance of permits for or the construction of apartments not already constructed and in use as apartments on October 21, 1978.

7. Under Ordinance 177, Section 10, Article XV, provision was made for the use of land in Pleasant Grove, classified residential, business or industrial in order of descending restrictiveness.

8. The land under contract between the plaintiffs, which is the focus of this controversy, was at all times, and at the time of trial still remained, designated B-2.

9. Under the land use structures of this ordinance, uses permitted in B-1 Neighborhood Business District zones are permitted in B-2 General Business District zones. (Article X, Section 2 of Zoning Ordinance 177 of Pleasant Grove, Alabama.) Article IX, Section 2 of the ordinance permits R-3 Multiple Dwelling District zone uses in B-1 zones. Article VIII specifically allows duplex and multi-family use in R-3 zones. Therefore, it follows from these sections that multi-family use is allowed in B-2 zones.

Elsewhere in the ordinance (Article XI, Section 10) multi-family uses are specifically allowed only in R-3 and B-1 zones. It was upon this inconsistency that much of the testimony was offered. Testimony of defendants' building inspector showed that in practice B-1 uses in B-2 districts have been approved.

10. Although variances are not recognized or granted for nonconforming uses, appeals were taken, from the issuance of plaintiffs' building permit, to the Board of Adjustment. Under local ordinances, this had the effect of a stay of all proceedings. The plaintiffs were notified by the Building Inspector on September 6, 1978, of this development, and work towards the plaintiffs' apartment complex was stopped.

11. Under the mandatory language of the ordinance, it becomes incumbent upon the Board of Adjustment to hold a hearing on the appeal. None was held. The appeal fee of one appellant, Councilman Morrison, was returned.

12. An advisory opinion was sought by Councilman Morrison from the Attorney General of Alabama. He

held the permit invalid, but the evidence was clear that the request was accompanied by only one portion of the zoning ordinance, taken out of context. The appended section was an excerpt from Article XV, Special Use Regulations. The basic nature of a zoning ordinance calls for analysis of the whole, of each sections interplay with the others. Given this deficiency in the materials submitted to the Attorney General, the persuasive effect of such a ruling is nil; in any event, this court is not bound by the opinion, and it will not control this court's decision.

13. The tract in issue is the only land in Pleasant Grove which can be feasibly served by the adjacent City of Birmingham sewer system, which the city officers knew or should have known. There is no sewer service otherwise to be found in Pleasant Grove.

14. Health regulations forbid the use of septic tanks as a means of waste disposal for apartment complexes.

15. The sewer connection proposed for plaintiffs' project was approved as adequate under existing health regulations.

16. There are in existence some 26 units of multi-family housing, none in the form of a complex, in the City of Pleasant Grove. There is near-constant occupancy, meaning that availability of these units is practically zero.

17. There is a great need, from the standpoint of urban planning, for increased multi-family housing for the City of Pleasant Grove. The effect of the lack thereof is to exclude people with low incomes, especially the young or old and black people generally. Demand for multi-family housing in Pleasant Grove is high.

18. Pleasant Grove is predominantly composed of single-family dwellings. New houses average $60,000 in price. Testimony revealed that no blacks reside in

Pleasant Grove. While new housing starts in the surrounding area were running some 49 percent multi-family dwellings between 1970 and 1978, the percentage in Pleasant Grove was .2 percent.

19. The site in question, because of its sewer line proximity, is the only such location where an apartment complex can feasibly be built in Pleasant Grove. For this reason, there can be no long-range "domino" effect from the construction of this complex. No other apartment complex of this type is foreseeable.

20. The site is located on the very edge of the corporate limits of the City of Pleasant Grove, and is served by a major thoroughfare. No significant traffic increase would develop, as testimony showed there was, at the time of trial, only a one-third capacity use of the city's streets. Similarly, the foreseeable effect on schools and environment was established as little or none. No single-family housing would be affected save that immediately nearby, already zoned B-2, and which the court finds will inevitably become converted at a later date into commercial property, and at a profit.

21. The type development proposed by the plaintiffs cannot be said to be detrimental to any community, as a matter of fact. Of the same general architectural style as many other apartment complexes in the surrounding areas, these would be "luxury" apartments, built at a cost of $2,325,000. There would be a proposed rental value per unit of $200 or more. The apartments are not designed to house undesirables, and are of a much higher quality than the existing 26 multi-family units.

22. There was some conflict in the expert testimony, but the better impression was conveyed by the plaintiffs' witnesses, particularly Dr. Reeves, who established that the highest and best use of the land in question would be multi-family housing, from both a planning and an appraisal standpoint. Defendants' expert, Mr. Outland,

testified that the highest and best use of the site would be commercial, but he did not exhibit as thorough a knowledge of the issues and facts as plaintiffs' experts.

23. Mr. House of the Birmingham Regional Planning Commission, which drafted the Comprehensive Plan for land use in Pleasant Grove, which the City did approve, testified without contradiction that the exclusion of multi-family housing uses from the B-2 districts was inconsistent with the philosophy of the Plan as a whole. In his expert opinion, the exclusion was an unintentional error of omission by the drafters of the ordinance.

Mr. House was in an ideal position to assess the intent of the draftsmen and the underlying philosophy of the ordinance in question here. Through his work with the Birmingham Regional Planning Commission he has become intimately familiar with its drafting philosophy and the zoning forms which it uses. The Commission drafted Ordinance 177 and has drafted many ordinances like it for various municipalities. The evidence showed that in doing so, the Commission follows a considered and consistent philosophy in which capricious variance plays no part.

In addition to his experience with other ordinances drafted by the Birmingham Regional Planning Commission, Mr. House supervised the drafting of the Comprehensive Plan from which Ordinance 177 sprang. The ordinance was to be an essential part of the embodiment of the Plan. Having supervised the formulation of the Plan as well as having drafted and worked with many ordinances of similar scope and intent during the course of his career, Mr. House was eminently qualified to speak from personal knowledge concerning the intent and philosophy sought to be implemented through the resulting ordinance. His uncontradicted testimony showed that there were no circumstances present to support or justify a variance from the Commission's normal philosophy which would allow multi-family dwellings in a B-2

zone. This external evidence coupled with the internal evidence found within the ordinance itself, clearly shows that the exclusion of multi-family dwellings from Article XI, Section 10, was a drafting oversight, a product of human error.

24. One permissible use for B-2 property is as a mobile home park. The ordinance permits this use without contradiction or ambiguity. The expert testimony all agreed that mobile homes presented a much less desirable land use than multi-family housing.

25. The logical conclusion to be drawn from paragraphs 23 and 24 above is that multi-family dwellings were intended to be allowed in B-2 districts. The clearly expressed intent to permit mobile home use in a B-2 district would alone be sufficient evidence to resolve the internal ambiguity as to the legislative intent to permit multi-family uses in B-2 districts. It is clear from both the expert testimony and the internal evidence from the wording of the ordinance that multi-family use is a higher use than as a mobile home park. If a mobile home park is permitted, it would defy common sense to hold that multi-family use was intended to be prohibited. The fact that a simple error was made by the draftsmen is obvious (in drafting Article XI, Section 10).

26. While construction costs and ancillary expenses have risen sharply since the permit was first issued, the testimony also showed that increased rentals would compensate for increased building costs.

27. The passage of Ordinance 216 was specifically directed at plaintiffs' proposed apartment development and exhibited bad faith on the part of the defendant community

## CONCLUSIONS OF LAW

1. There was insufficient evidence to show the existence of a racially discriminatory motive behind the actions taken against the proposed development. Plaintiffs

did not carry their burden of proof in this regard. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979).

2. Plaintiffs have standing under the fourteenth amendment to protect their property rights from being taken without due process of law. *Wells Fargo Armored Service Corp. v. Georgia Public Service Commission*, 547 F.2d 938 (5th Cir. 1977); *International Association of Firefighters, Local 2069 v. City of Sylacauga*, 436 F. Supp. 482 (N.D. Ala. 1977).

3. The plaintiffs' failure to exhaust remedies otherwise available is no bar to this action, especially in light of the failure of the Board of Adjustment to hold a hearing on the appeal as required under the defendants' local ordinances. *Wells Fargo Armored Service Corp. v. Georgia Public Service Commission, supra.*

4. In that the implementation of the exclusionary ordinance No. 216 was arbitrary and capricious, as for example to disallow apartments but permit the less desirable use of mobile home parks, and was found to be specifically intended to prevent the plaintiffs from exercising their valid building permit, Ordinance 216, as applied, is violative of plaintiffs' fourteenth amendment rights to due process of law as a confiscatory measure. *Maher v. City of New Orleans*, 516 F.2d 1051, rehearing denied 521 F.2d 815 (5th Cir. 1975), cert. denied 426 U.S. 905, 96 S. Ct. 2225, 48 L. Ed. 2d 830. It bears no substantial relationship to recognized legitimate concerns for health, safety or welfare, or the general well-being of the community, *Village of Belle Terre v. Boras*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), in view of the great need for multi-family housing, the minimal foreseeable adverse impact that would occur as a result of the apartment complex, and the allowance of the use of land for trailer parks in the same area, which all expert wit-

nesses agreed was a less desirable use than multi-family dwellings such as the ones proposed to be built by plaintiffs.

5. Because Ordinance 177 presents inconsistency and ambiguity with regard to multi-family dwellings being permitted in B-2 areas by one construction but forbidden by another (see discussion of the mechanics of this inconsistency in paragraph 9 of the findings of fact), it is proper to admit parol evidence to resolve the issue. In light of the ample evidence of legislative intent, in keeping with basic judicial policy of avoiding the capricious rejection of legislation, and in view of the prior finding of fact (No. 19) that this parcel was known to be the only practicable site for apartments in the whole of Pleasant Grove, the court finds that the proper interpretation of Ordinance 177 would allow the use of this tract for construction of the proposed apartment complex. *Henderson v. Zoning Appeals Board of Jefferson Parish*, 328 So. 2d 175 (La. App. 1975), cert. denied 331 So. 2d 474; 101 C.J.S. Zoning §§ 129-130.

6. The plaintiffs were issued a building permit in accordance with Ordinance 177 which apparently would allow the construction of the multi-family housing on the desired site. They relied upon this permit in good faith. The expert testimony and evidence of the legislative intent substantiates this interpretation. To declare the permit as other than valid would impair the contractual rights obtained in reliance thereon. In view of all that is before the court for its consideration in this case, upholding the validity of the building permit is the only sound path. The permit's validity cannot be voided in this situation even through the passage of a subsequent ordinance as was attempted here. Exclusionary provisions like Ordinance 216 ordinarily cannot be retroactively applied.

7. The effect of the stay of all proceedings in view of the appeal to the Board of Adjustment would be

limited to a reasonable time and would have no continuing effect. The defendants having failed to provide the hearing on appeal as required, a discontinuance was worked and the stay was dissolved.

8. The law appears to recognize liability in damages by a city for infringements of claimants' rights if the damages result from an unconstitutional public policy of the city. *Monell v. Department of Social Services, City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Here, however, the evidence does not support an award of damages, as increased rentals were shown to be a generally accepted method of recoupment of the increased costs brought on by the delay. The stay being ineffective, furthermore, plaintiffs' building permit remains valid and no loss occurred as to it.

9. The court having been convinced of the bad faith of the defendants in obstructing the plaintiffs' enterprise, and attempting to adopt a confiscatory measure as regards it, an award of attorney's fees is in the sound discretion of the court. *Lane v. Inman*, 509 F.2d 184 (5th Cir. 1975). Accordingly, the court awards plaintiffs the sum of $5,000, which was the only fee established by the evidence, and which the court deems reasonable under all the attendant circumstances.

10. Injunctive relief is appropriate to protect the irreparable injury that would result from deprivation of constitutional rights. *International Association of Firefighters, Local 2069 v. City of Sylacauga, supra.*

An appropriate order in conformity with the foregoing will be entered.

DONE this 9th day of November 1979.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
United States District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-G-1150-S

[Filed Apr. 15, 1980]

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama corporation,
*Plaintiffs,*

v.

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Defendants.*

### ORDER

In conformity with and pursuant to the Memorandum Opinion of the court contemporaneously entered herewith, it is

ORDERED, ADJUDGED and DECREED that plaintiffs are not entitled to further relief as prayed for in their Motion for Reconsideration filed November 19, 1979.

It is FURTHER ORDERED that Paragraph 26 at Page 7 of the Findings of Fact and Conclusions of Law entered contemporaneously with the court's order of November 9, 1979, be and it hereby is STRICKEN for good cause shown.

DONE and ORDERED this 15th day of April 1980.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-G-1150-S

[Filed Apr. 15, 1980]

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama corporation,
*Plaintiffs,*

v.

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,
*Defendants.*

## MEMORANDUM OPINION

This is an action under 42 U.S.C. §§ 1983, 1985, and the fourteenth amendment of the Constitution of the United States which was tried to this court, being a non-jury case, the week of July 10, 1979. Judgment was entered in favor of the plaintiffs and against the defendants on November 9, 1979. In addition, the plaintiffs were awarded at that time $5,000.00 as a reasonable attorney's fee, and the defendants were permanently enjoined from enforcement of Ordinance 216 insofar as it interfered with the plaintiffs' rights under contract and under the building permit which was issued August 8, 1978. This is now before the court on motion for reconsideration filed by the plaintiffs on November 19, 1979. This motion is

limited to the issue of whether the plaintiffs are entitled to compensatory damages, including increased financing and construction costs, caused by defendant's actions.

Prior to the recent United States Supreme Court opinion in *Monell v. Department of Social Services of the State of New York* ,436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), local governments were completely immune to suits under § 1983, as had been held in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1960). *Monell*, which reversed *Monroe*, removed the absolute immunity which municipal bodies had long enjoyed, but declined to decide at that time the appropriateness of a qualified immunity. Mr. Justice Powell stated in his concurring opinion that the *lower federal courts* must make the initial determination whether the protection available at common law for municipal corporations or other principles supports a qualified municipal immunity in the context of the § 1983 damages action. *Monell, supra*, 436 U.S. at 713, 98 S. Ct. at ——, 56 L. Ed. 2d at 650.

This court, after lengthy consideration, finds that the defendants in this action are shielded by the defense of a qualified immunity, the requirements of which are set forth in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). There the Supreme Court said:

> *It is the existence of reasonable grounds for the belief formed* at the time and in light of all the circumstances, *coupled with good-faith belief*, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

416 U.S. at 247, 94 S. Ct. at ——, 40 L. Ed. 2d at 103 (emphasis added). If this is applicable to public officers, it is only logical that it applies to *public bodies* as well.

In reevaluating the development of the evidence at trial, the court has reconsidered, in light of the attending circumstances, the actions by the defendant City of Pleasant

Grove as they relate to the then-existing zoning ordinance No. 177 and the building permit issued by the same to the plaintiffs. The court finds that the city officials did in good faith believe that Ordinance No. 177 prohibited multifamily dwellings in a B-2 zone. "Multifamily dwelling" by definition of that ordinance means a dwelling of *more than two* families. This destroys plaintiffs' approach that the City had always granted permits for multifamily dwellings in the past—i.e., duplex houses accommodating only two families. The court finds that a preponderance of the evidence, circumstantial in nature, not including the Attorney General's opinion that the permit was invalid, as discussed later in this opinion, reveals that the city officials in good faith believed that Ordinance No. 177 forbade construction of the apartment project here in question. The interpretation of this ordinance is a close question. Based on traditional rules of construction, the result reached by the City was not unreasonable. Not only does the court take notice that none of the members of the council are attorneys, but the court points out that the conclusion reached by the defendant City could easily have been reached by attorneys who are nonspecialists in zoning matters. Such lawyers would probably apply the rule of construction that the specific controls the general where conflicting provisions exist. Therefore, Article XI, Section 10 of the Ordinance 177, specifically allowing multifamily uses only in R-3 and B-1 zones, would control Article X, Section 2, permitting B-1 uses in B-2 zones. The wording of the ordinance is ambiguous and the court had to consider both intrinsic and extrinsic evidence to determine the legislative intent. The court went to some length to develop the rationale, independently of the arguments presented by counsel, that because *mobile homes*, which were considered an inferior type of housing in the opinion of all trial witnesses and therefore a lower use than multifamily dwellings, were permitted in a B-2 zone, it was an oversight for multifamily dwellings not to be allowed in the same zone. (See District Court Findings

of Fact and Conclusions of Law, at 6, paragraph 3.) It takes a subtle analysis (and outside evidence was also helpful) to arrive at this conclusion and the court, therefore, can easily understand why others may have reasoned differently.

The court has expertise in the area of zoning law. He has been a city attorney for six municipalities at different times and has litigated fairly extensively in this area over 25 years of trial practice. He has drafted complex zoning ordinances for two municipalities and served as chairman of a planning commission. The court found the interpretation of Ordinance 177 by the City to be erroneous, but concludes there was no bad faith by the defendant City involved in its interpretation. The City, relying on the Attorney General's opinion of August 30, 1978, denied the building permit before Ordinance 216 was considered. Ordinance 216 simply reinforced the decision in reliance on the Attorney General's opinion. It was a measure to pacify and reassure the disquieted community, as reflected by its city referendum. The court, moreover, reaffirms its prior findings as to Ordinance No. 216, but finds it not to be inconsistent with a finding of good-faith belief as to the meaning of Ordinance No. 177.

Although Councilman Morrison sent only a part of Ordinance No. 177 to the Attorney General for his consideration prior to his opinion dated August 30, 1978, the Attorney General eventually received the entire ordinance, but no further opinion was forthcoming in this regard. As far as the record discloses, the Attorney General did not consider that the additional submitted material would change his opinion. The court does not consider the referral of inadequate information by Councilman Morrison to have been motivated by bad faith; on the contrary, it simply reflects his lack of legal training and inexperience in resolving ordinance conflicts. A non-attorney cannot be charged with bad faith for not recognizing that there was a conflict in the ordinance.

If the court did not find qualified immunity to be a valid defense in this § 1983 action, which it does, it would probably be necessary to grant damages to the plaintiffs; there is no inequity here, in any event, however, because the plaintiffs have land which, according to the witness Young, has increased in value at least $80,000.00. Certainly, however, the court would not grant damages for *financing costs* which were not only unforeseeable but at best were speculative. There is no constitutional right to borrow money. The measure of damages is the fair *cash* market value of the property right taken, not the fair *credit* market value. The law of damages presumes that one will pay cash and not be compelled to borrow.

The court reasserts its position stated earlier in the Findings of Fact and Conclusions of Law and accompanying order, that Ordinance 177 does not prohibit the construction plaintiffs desire and that Ordinance 216 is unconstitutional as applied to plaintiffs, and the injunction heretofore entered is continued in full force and effect.

An award of damages is disallowed due to a finding that the elements of a defense have been proved under the doctrine of qualified immunity.

A separate order in conformity herewith will be entered this date.

DONE this the 15th day of April 1980.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 78-G-1150-S

[Filed Aug. 4, 1980]

JOSEPH WHEELER; CLARICE WHEELER;
CLIFF DEVELOPMENT CORPORATION; and
S & S BUILDERS, INC., an Alabama corporation,
*Plaintiffs,*

v.

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,
*Defendants.*

### SUPPLEMENTAL OPINION

After due consideration, and in light of the recent decision by the United States Supreme Court in *Owen v. City of Independence, Missouri*[1], this court finds it incumbent to make some clarifications regarding its decision of April 15, 1980. The court is convinced that it erred in its reasoning in that opinion, but not in the result it reached; and these further statements, therefore, should be made on record for the benefit of all parties and the appellate court.

---

[1] No. 78-1779 (April 16, 1980).

The court was led into error by an overzealous plaintiff and by a defendant who failed to point out that a constitutional deprivation of rights did not exist. Both parties argued the constitutional question of Ordinance 177, the first ordinance which the City Council of Pleasant Grove interpreted as not allowing the building of apartments in a B-2 zone, and which ordinance the Attorney General of the State of Alabama approved in an official opinion. The parties argued that the case turned on the applicability of the defense of qualified immunity. Although, in the alternative, this court still finds qualified immunity an appropriate defense under the facts of this case as distinguished from *Owen*, discussed further herein, it is of the opinion that the *result* determined earlier is sound regardless of the reasoning that led to it. This is based on the following reasons.

The jurisdiction of this court was properly sought under 42 U.S.C. § 1983, which created a constitutional tort action, to enjoin enforcement of Ordinance 216, which was passed by the City Council of Pleasant Grove in bad faith to reinforce its earlier ruling made in good faith regarding the building of apartments in a B-2 zone under Ordinance 177. An injunction was granted enjoining enforcement of Ordinance 216 due to its enactment in bad faith. Prior to the passage of Ordinance 216, however, no action by the City Council rose to the constitutional level so as to allow federal jurisdiction over the case. Although there is no state law issue pleaded in this case, the misinterpretation of Ordinance 177, made by the City Council of Pleasant Grove in good faith, was a state law violation and not before this court. The enforcement of Ordinance 177, as interpreted by the City Council, was, however, the proximate cause of any money damages that might have resulted. If there is not a constitutional tort, no one is entitled to damages under § 1983. It is not a denial of substantive due process to adhere to a theory of law fairly arguable until a court of competent jurisdiction decides the question. This court would not have juris-

diction over any controversy involving Ordinance 177 except for the constitutional deprivation resulting from the passage and threatened enforcement of Ordinance 216. The only remedy for this constitutional violation is an injunction as granted by this court against enforcement of Ordinance 216. Damages are not appropriate because enforcement of Ordinance 216 is not the proximate cause of the injury. It was necessary, however, for the court to make a determination as to Ordinance 177, which it did, in order to decide whether passage and enforcement of Ordinance 216 deprived the plaintiffs of any constitutional rights.

In this case, as to Ordinance 177, there was a mere legal mistake of interpretation, for which there is the remedy of mandamus at law, a remedy never sought by the plaintiffs. Instead, they came into equity seeking an injunction which it was only possible for a court to grant because of the passage of Ordinance 216. Denial of substantive due process involves more than a good faith mistaken opinion of law, as in the case of Ordinance 177. If all misinterpretations of city ordinances were considered constitutional deprivations, federal courts would be swamped with cases. Likewise, there is no lack of procedural due process in the case at bar as there was in the recent *Owen* decision aforementioned.

Ordinance 177 was simply a zoning ordinance which was ambiguous and subject to two reasonable arguable interpretations which the court discussed in its first opinion. The city denied the permit under its erroneous constructon of its ordinance, and all the money damages from delay resulted from that denial. Ordinance 216 was passed to eliminate all apartment construction in the city in whatever zone in the future, and the court has held that as to these plaintiffs its passage was an act of bad faith, although the enforcement of Ordinance 177 was in good faith. The Ordinance 216 question was a constitutional question. However, the plaintiffs were

only entitled to injunctive relief as to future enforcement of Ordinance 216, because as long as the city's interpretation of Ordinance 177 continued in force and effect, Ordinance 216 played no part in the decision making. The decision was made before Ordinance 216 was enacted. The plaintiffs did have a right to have this constitutional hurdle removed so that it would give them no future difficulty. It is therefore plain that all money damages were the proximate consequence of the erroneous interpretation of Ordinance 177 and the consequent enforcement of that interpretation. Ordinance 216 played no part whatsoever in the chain of causation up to the time of the court's decision, but would have been a serious impediment to the plaintiffs in the future if the court had simply corrected the city's interpretation of Ordinance 177 and had not held Ordinance 216 unconstitutional.

In this court's Memorandum Opinion of April 15, 1980, Ordinance 177 was treated on the same level with Ordinance 216. That was erroneous. Rather than concentrating on the basic constitutional issue discussed at length herein, the court addressed the defense of qualified immunity for the municipality of Pleasant Grove. Some additional comments in view of the *Owen* decision are necessary. On April 16, 1980, in a five-to-four decision, the Supreme Court held that municipalities have no immunity from damages liability flowing from their constitutional violations. The statement of the court goes beyond the holding. This court does not believe that under the facts of Pleasant Grove the Supreme Court would have so held.

The facts in *Owen*, for the most part, reveal a case of libel. The City Manager discharged the Chief of Police after the City Council of Independence, Missouri, moved that reports of an investigation of the city police department be released to the news media and turned over to the prosecutor for presentation to the grand jury. The City Manager was to take appropriate action against

the persons involved in the wrongful activities brought out in the investigative reports. By releasing these reports to the press, the city officials disparaged the chief's reputation by making allegedly false accusations about his job performance. The police chief was given no reason for his dismissal, and an appeal of his discharge was denied. He brought suit thereafter in federal district court under 42 U.S.C. § 1983, alleging that he was discharged without notice of reasons and without a hearing, in violation of his constitutional rights to procedural and substantive due process. The district court entered judgment for the city. The court of appeals affirmed, based on the qualified immunity of the city, but found, nevertheless, that the city's allegedly false public accusations had blackened the police chief's name and reputation, depriving him of liberty without due process of law.

A comparison of the *Owen* case with *Pleasant Grove* reveals some significant distinctions. In *Owen* there were violations of clearly established constitutional rights. In *Pleasant Grove* there is an ambiguous ordinance (No. 177) and no clear violation of rights as to that ordinance. Plaintiffs did not have a constitutional right to build apartments in a B-2 zone, as set out in Ordinance No. 177. As aforementioned, the Attorney General of the State of Alabama approved this ordinance in an official opinion.

The *Owen* case concerned a *personal* right not to have one's reputation disparaged without recourse. *Pleasant Grove* involves the application of zoning ordinances and their effect on the use of land owned by a corporation. There is no violation of a right of personal liberty as in *Owen*. The facts surrounding *Pleasant Grove* are not outrageous, as are the ones in *Owen*. This court, through a careful analysis, determined a *close* question of law in favor of the plaintiff corporation. There is a constitutional deprivation here only because of the passage of Ordinance 216. Pleasant Grove should have been en-

joined, as it was, from enforcing Ordinance 216, but it should not be required to pay damages.

In *Owen* there was held to be no qualified immunity based on a mistake of fact. Here, qualified immunity was held to exist as to a claim based on a mistake of law. *Owen* did not address this issue of qualified immunity where there is a mistake of law as opposed to one of fact.

The Supreme Court in *Owen* said:

> Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy support a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals.

*Owen v. City of Independence, Missouri*, No. 78-1779 (April 16, 1980), at 15. Although qualified immunity for municipalities may not be supported by history, there are serious reasons of *policy* to support such a defense in a case like *Pleasant Grove*. The strict liability approach of *Owen* could easily bankrupt local governments. Small communities of limited means, such as Pleasant Grove, may be deprived of rational means of government by the chilling effect of *Owen*. The effective operation of municipal corporations could be threatened; local officials could be prevented from exercising necessary and customary functions. Many municipalities may well be unable adequately to serve their citizens.

For the above-stated reasons, this court continues to hold in the alternative that the defense of qualified immunity is available under these facts.

It is ORDERED that these additional findings be made part of the court's findings for purpose of the appellate record.

DONE and ORDERED this 23rd day of July, 1980.

/s/ J. Foy Guin, Jr.
J. FOY GUIN, JR.
United States District Judge

## APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK

January 21, 1982

NORMAN E. ZOLLER
Clerk

Tel. 404-221-8187
FTS-242-8187
50 Forsyth St. N.W.
Atlanta, Georgia 30302

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 80-7306

WHEELER, *et al.*

-VS-

CITY OF PLEASANT GROVE, ETC., *et al.*

CA78-G-1150-S

---

The following action has been taken in the above case:

☒ AN EXTENSION OF TIME has been granted to and including February 19, 1982, for filing of a petition for writ of certiorari by the defendants-appellees-cross appellants.

☐ for filing appellant's/petitioner's brief.

☐ for filing appellee's/respondent's brief.

☐ for filing reply brief.

☐ for filing petition for rehearing.

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief *amicus curiae* is granted.

☐ Joint motion as to time for filing briefs granted.

☐ Order enclosed has been entered.

☐

NORMAN E. ZOLLER
Clerk

By: /s/ Linda Pritt
Deputy Clerk

cc: Mr. Donald H. Brockway, Jr.
Mr. Thomas N. Crawford, Jr.

## APPENDIX F

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S.C.A. Constitutional Amendment 14, Section 1. provides in pertinent part as follows:

> Section 1. . . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 2201 provides as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides as follows:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

# Opposition

Supreme Court, U.S.
FILED
APR 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1547

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Petitioners,*

v.

JOSEPH WHEELER; CLARICE WHEELER; CLIFF DEVELOPMENT CORPORATION; and S & S BUILDERS, INC., an Alabama Corporation,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION

DONALD H. BROCKWAY, JR.
(Counsel of Record)
CORRETTI & NEWSOM
1804 7th Avenue North
Birmingham, Alabama 35203
(205) 251-1164

*Attorneys for Respondents*

## LIST OF PARTIES

The following were parties to this proceeding in the Court of Appeals: Joseph Wheeler; Clarice Wheeler; Cliff Development Corporation; City of Pleasant Grove, a municipal corporation; Bobby Patrick, as Mayor of the City of Pleasant Grove; Hollis H. Cain, as Chairman of the City Council of Pleasant Grove; Edward C. Capps, Joseph A. Cooper, Milton C. Russell, as members of the City Council of the City of Pleasant Grove; and James E. Medlock, as Building Inspection Officer of the City of Pleasant Grove.[1]

---

[1]The List of Parties appearing on page ii of the Petitioners' Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit incorrectly lists S & S Builders, Inc., an Alabama corporation, as a party to the proceeding in the Court of Appeals. S & S Builders, Inc., was a plaintiff in this lawsuit at the Federal District Court level, however, S & S Builders, Inc., withdrew from the appeal of this case and assigned all of its rights and interest growing out of the subject matter of the litigation to Cliff Development Corporation.

This withdrawal was brought to the attention of the United States Court of Appeals for the Eleventh Circuit by way of footnote to the Certificate of Interested Persons in the appellants' initial brief in the case at bar, which was filed with the United States Court of Appeals for the Eleventh Circuit.

## TABLE OF CONTENTS

*Page*

LIST OF PARTIES ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 2

STATEMENT OF THE CASE ..... 2

A. Procedural Overview ..... 2

B. The District Court's Opinions ..... 5

REASONS FOR DENYING THE WRIT ..... 6

Introduction ..... 6

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *VILLAGE OF EUCLID V. AMBLER REALTY COMPANY* ..... 7

II. THE PETITIONERS ARE NOT IN A POSTURE TO COMPLAIN ABOUT THE POSSIBLE RETROACTIVE APPLICATION OF *OWEN V. CITY OF INDEPENDENCE* ..... 9

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

*Page*

*Hander v. San Jacinto Jr. College*, 519 F.2d 273 (CA5), rehearing denied, 522 F.2d 204 (1975) ..... 11

*Henderson v. Zoning Appeals Board of Jefferson Parish*, 328 So. 2d 175 (La. App. 1975), cert. denied, 331 So. 2d 474; 101 C.J.S. Zoning §§129-130 ..... 8

*Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) ..... 6

*Scheuer v. Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) ..... 10

*United States v. Smith*, 492 F.2d 906, 907 (5th Cir. 1974) ..... 2

*Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) ..... 6

No. 81-1547

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CITY OF PLEASANT GROVE, a municipal corporation; BOBBY PATRICK, as Mayor of the City of Pleasant Grove; HOLLIS H. CAIN, as Chairman of the City Council of Pleasant Grove; EDWARD C. CAPPS, JOSEPH A. COOPER, MILTON C. RUSSELL, as members of the City Council of the City of Pleasant Grove; and JAMES E. MEDLOCK, as Building Inspection Officer of the City of Pleasant Grove,

*Petitioners,*

v.

JOSEPH WHEELER; CLARICE WHEELER; CLIFF DEVELOPMENT CORPORATION; and S & S BUILDERS, INC., an Alabama Corporation,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

City of Pleasant Grove, a municipal corporation; Bobby Patrick, as Mayor of the City of Pleasant Grove; Hollis H. Cain, as Chairman of the City Council of Pleasant Grove; Edward C. Capps, Joseph A. Cooper, Milton C. Russell, as members of the City Council of the City of Pleasant Grove; and James E. Medlock, as Building Inspection Officer of

the City of Pleasant Grove, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Joseph Wheeler, et al., vs. City of Pleasant Grove, a municipal corporation, et al.,* entered on December 18, 1981.

## OPINIONS BELOW

The presentation by Petitioners of the opinions below in their appendices is correct, however, Petitioners include as one of their appendices the supplemental decision issued by the District Court subsequent to the respondents' appeal of this case to the United States Court of Appeals for the Fifth Circuit, which said appendix is designated by the petitioners as App. D (24a-30a).

Respondents filed in the United States Court of Appeals for the Fifth Circuit a Motion to Strike the supplemental opinion of the District Court, which specifically set out that the District Court had lost jurisdiction by virtue of the Respondents having filed their Notice of Appeal on April 17, 1980 and that the Fed. R. App. Proc. pertaining to correction or modification of the record did not empower the District Court to modify or make new findings of fact after the docketing of the appeal in the Court of Appeals. 28 U.S.C.A., Fed. R. App. Proc. 10(e); *United States v. Smith,* 492 F.2d 906, 907 (5th Cir. 1974). Said motion was carried with the case and it was not until oral argument on the merits that counsel for your respondents was informed that the Court below would not consider the supplemental opinion filed by the District Court Judge on August 4, 1980.

## STATEMENT OF THE CASE

### A. Procedural Overview

The birth of this case occurred as the result of a uniquely white community's, the City of Pleasant Grove's, attempt to

perpetuate racial segregation through the use of exclusionary zoning.

On November 9, 1979 the District Court rendered a Findings of Fact and Conclusions of Law, together with an Order and Permanent Injunction. This Order enjoined the City from the enforcement of Ordinance No. 216, insofar as it would result in interference with the respondents' rights under contract and under the building permit issued August 8, 1978. The District Court also retained jurisdiction to prevent further interference with the respondents' rights under the building permit and the contract. The Court awarded to respondents five thousand dollars ($5,000.00) as a reasonable attorney's fee. No other damages were awarded.

On November 19, 1979, the respondents filed a Motion for Reconsideration pursuant to Rules 52, 59 and 60 of the Federal Rules of Civil Procedure. This motion was to reconsider the issue of damages as expressed in the Court's Order and Findings of Fact and Conclusions of Law dated November 9, 1979. Briefs and oral argument were received by the Court.

A Memorandum Opinion was entered by the District Court on April 16, 1980. In that opinion the District Court reasserted its position stated earlier in the Findings of Fact and Conclusions of Law of November 9, 1979 and accompanying Order, that Ordinance No. 177 did not prohibit the construction that the respondents desired, that Ordinance No. 216 was unconstitutional as applied to the respondents, and that the injunction entered was continued in full force and effect. The Court, however, disallowed damages due to a finding that the elements of a defense of a qualified immunity based upon good faith had been proved by the City. Notice of Appeal was filed by the

respondents on April 17, 1980. A Notice of Cross-Appeal was filed by the City on May 8, 1980.

Also, an Application for Stay of Judgment or Order of the District Court pending appeal, or for the approval of a supersedeas bond was filed by the City on May 8, 1980. The District Court granted this application subject to the filing of a supersedeas bond in the amount of three hundred thousand dollars ($300,000.00). To date, the City has elected not to put up this bond.

The District Court entered and filed a Supplemental Opinion on August 4, 1980 that was the subject of a Motion to Strike filed by your respondents in the United States Court of Appeals for the Fifth Circuit. Further explanation of the outcome of this Motion to Strike has previously been set out by your respondents in its presentation of the Opinions Below at p. 2 of this brief.

### B. The District Court's Opinions

The District Court did in fact enter extensive Findings of Facts and Conclusions of Law, however, when these Findings of Fact and Conclusions of Law are scrutinized they are much more enlightening than is represented by the portion highlighted by your petitioners.

The District Court had before it Ordinance No. 177, which was the City's original zoning ordinance, and Ordinance No. 216, which amended Ordinance No. 177 on October 16, 1978. The District Court found that Ordinance No. 177 was amended by Ordinance No. 216, "[a]fter some considerable community disquietude . . . showing overwhelming dislike for the apartment complex proposed to be built." App. B (8a).

The District Court found that, "[u]nder the land use structures of this ordinance [Ordinance No. 177], uses permitted in B-1 Neighborhood Business District zones are

permitted in B-2 General Business District zones. (Article X, Section 2 of Zoning Ordinance 177 of Pleasant Grove, Alabama.) Article IX, Section 2 of the ordinance permits R-3 Multiple Dwelling District zone uses in B-1 zones. Article VIII specifically allows duplex and multi-family use in R-3 zones. Therefore, it follows from these sections that multi-family use is allowed in B-2 zones." App. B (9a). The subject property is zoned B-2.

Furthermore, the District Court found that, "Ordinance 216, in the nature of an 'exclusionary zoning' measure, prohibits the issuance of permits for or the construction of apartments not already constructed and in use as apartments on October 21, 1978." App. B (8a). The District Court conclusively found that, "[t]he passage of Ordinance 216 was specifically directed at plaintiffs' proposed apartment development and exhibited bad faith on the part of the defendant community." App. B (13a).

The District Court concluded as a matter of law that,

> [i]n that the implementation of the exclusionary [O]rdinance No. 216 was arbitrary and capricious, . . . and was found to be specifically intended to prevent the plaintiffs from exercising their valid building permit, Ordinance 216, as applied, is violative of plaintiffs' [F]ourteenth [A]mendment rights to due process of law as a confiscatory measure. . . . It bears no substantial relationship to recognized legitimate concerns for health, safety or welfare, or the general well-being of the community, . . . in view of the great need for multi-family housing, the minimal foreseeable adverse impact that would occur as a result of the apartment complex, and the allowance of the use of land for trailer parks in the same area, which all expert witnesses agreed was a less desirable use than multi-family dwellings such as the ones proposed to be built by plaintiffs."

App. B (14a). (Citations omitted.) Furthermore, the Court concluded as a matter of law that, "[T]he Court having been convinced of the bad faith of the defendants in obstructing the plaintiffs' enterprise, and attempting to adopt a confiscatory measure as regards it, an award of attorney's fees is in the sound discretion of the court." App. B (16a). (Citation omitted.)

Although the District Court entered a subsequent Order and Memorandum Opinion on April 16, 1980, the Order and Memorandum Opinion did not disturb the above-highlighted Findings of Fact and Conclusions of Law of the original opinion of November 9, 1979.

## REASONS FOR DENYING THE WRIT

### Introduction

The Court below did not improperly apply *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) (hereinafter referred to as *Euclid*). The Court below simply held that the District Court's Findings of Fact relative to Ordinance No. 177 were not clearly erroneous and consequently did not disturb the District Court's conclusion based upon its findings relative to Ordinance No. 177. This was a correct application of the clearly erroneous standard by the Court below and not a misapplication of *Euclid* as suggested by the petitioners.

With regard to the petitioners' second contention for granting the Writ, the conclusive deficiency of that argument and the decisive factor for denying the Writ is revealed in Justice Brennan's opinion for the majority in *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) (hereinafter referred to as *Owen*). Footnote 15 in *Owen* clearly states that the United States Court of Appeals for the Fifth Circuit had since 1975

refused to extend a qualified immunity based on the good faith of their officials to the governmental entity.

Secondly, the petitioners are ludicrously asking this Court to grant the Writ based upon their belief that they had a right to rely on qualified immunity to act unconstitutionally prior to the *Owen* decision. Qualified immunity if it existed at all prior to *Owen* was an affirmative defense not a right to act unconstitutionally. Consequently, the City of Pleasant Grove had no right to act unconstitutionally in reliance on any qualified immunity, whether or not it existed prior to *Owen*.

## I

## THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *VILLAGE OF EUCLID V. AMBLER REALTY COMPANY*

Neither the District Court nor the Court below recognized that the City's ordinance was subject to two interpretations. Quite to the contrary both recognized, found and concluded that it was subject to only one reasonable interpretation.

The District Court concluded:

> In light of the ample evidence of legislative intent, in keeping with basic judicial policy of avoiding the capricious rejection of legislation, and in view of the prior finding of fact (No. 19) that this parcel was known to be the only practicable site for apartments in the whole of Pleasant Grove, the Court finds that the proper interpretation of Ordinance 177 would allow the use of this tract for the construction of the proposed apartment complex.

App. B (15a) (Citation omitted.)

The Court below opined:

> The court below [the District Court] considered the evidence on the issue and ruled that the proper interpretation of Ordinance no. 177 allowed the use of the tract in question for apartment complexes. We see no reason to disturb this finding under the clearly erroneous rule. Our review of the ordinance leads us to the same interpretation with respect to the permitted use of the tract for apartments in light of the evidence presented. Therefore, the plaintiffs had a legitimate permit under Ordinance no. 177.

App. A (3a).

The Court below only relied on *Euclid* to support its conclusion that, "[t]he application of City Ordinance No. 216 to the plaintiffs was unconstitutional." App. A (3a). This is without doubt a correct application of *Euclid* by the Court below.

The District Court relied on *Henderson v. Zoning Appeals Board of Jefferson Parish*, 328 So. 2d 175 (La. App. 1975), cert. denied, 331 So. 2d 474; 101 C.J.S. Zoning §§129-130, to support its conclusion that it had the right to interpret Ordinance No. 177. The District Court correctly applied *Henderson v. Zoning Appeals, id.*

However, assuming arguendo that the petitioners are correct in stating that the Court below applied *Euclid* in reaching its conclusion regarding Ordinance No. 177, the Court below applied *Euclid* correctly. As relied upon by the petitioners for this point[2] *Euclid* simply says that the legislative

---

[2]Petitioner fails to recognize that This Court in 1926 when *Euclid* was decided recognized that *even then* they could not "exclude the possibility of cases where the general public interest would so far outway the interest of the municipality that the municipality would not be allowed to stand in the way," *Euclid, supra.*, at 272 U.S. 390, of future development of lands to satisfy the housing needs of all segments of the population.

Respondents respectfully submit that the petitioners request for a proper application of *Euclid* to the case at bar would mandate the result which has already been reached by the United States Court of Appeals for the Eleventh Circuit, rather than to allow the municipality to place its

judgment shall be given deference if the classification for zoning purposes be "fairly debatable." The District Court and the Court below simply concluded factually that the legislative [the Pleasant Grove City Council] classification for Ordinance No. 177 was not "*fairly* debatable." Consequently, this was not a misapplication of *Euclid*, but simply a factual finding using the *Euclid* standard, which, for purposes of review, is still tested by the clearly erroneous rule.

Conclusively, the Court below correctly applied its clearly erroneous standard. If the petitioners wish to interpret this as an application of *Euclid* then, in that event, the respondents respectfully submit that the Court below correctly applied *Euclid*.

## II

## THE PETITIONERS ARE NOT IN A POSTURE TO COMPLAIN ABOUT THE POSSIBLE RETROACTIVE APPLICATION OF *OWEN V. CITY OF INDEPENDENCE*

The conclusive deficiency of the petitioners' argument regarding the application of *Owen* is revealed in the *Owen* decision itself. Justice Brennan, in speaking for the majority of the Court, reversed the Eighth Circuit Court of Appeals and went into great length in stating the reasons for the majority's disagreement with the Eighth Circuit's holding. Introducing those reasons, Justice Brennan wrote, "[w]e turn now to the reasons for our disagreement with this holding[15]." *Owen v. City of Independence, supra.*, at 635.

---

judgment in the way of the general public interest. It appears to your respondents that it is now incumbent upon courts to recognize and mandate the duty on the part of local communities in planning for the future development of lands within their territorial limits to take in to account the housing needs of all segments of the population and to make available, under and as part of their comprehensive zoning scheme, some reasonable portions of such lands for moderate and low-cost housing.

An analysis of n. 15 reveals immediately the deficiency in the petitioners' argument:

> 15. The Courts of Appeals are divided on the question whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot v. School Dist. No. 1,* 613 F.2d 245 (CA10 1979) (en banc), *Hostrop v. Board of Junior College Dist. No. 515,* 523 F.2d 569 (CA7 1975), and *Hander v. San Jacinto Jr. College,* 519 F.2d 273 (CA5), rehearing denied, 522 F.2d 204 (1975), all refusing to extend a qualified immunity to the governmental entity, with *Paxman v. Campbell,* 612 F.2d 848 (CA4 1980) (en banc), and *Sala v. County of Suffolk,* 604 F.2d 207 (CA2 1979), granting defendants a "good-faith" immunity.

*Owen v. City of Independence, supra.,* at 635, n. 15.

By this footnote, This Court recognized that the Fifth Circuit had since 1975 refused to extend qualified immunity based on the good faith of officials to the governmental entities themselves. This is conclusive of the argument made by the petitioners as to the retroactive application of *Owen.* As to Fifth and Eleventh Circuit cases the application of *Owen,* for this principle, is simply not a retroactive application of a new principle, but merely a recognition and solidification by This Court of the state of the law on this issue as it existed at that time in these two circuits.

Furthermore, Justice Brennan in writing for the majority recognized in *Owen* the distinction of *Scheuer v. Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), (hereinafter referred to as *Scheuer*), which reveals the err in the District Court's extrapolation of the *Scheuer* principle to apply qualified immunity to the City of Pleasant Grove. However, respondents respectfully submit that one need only read *Scheuer* in conjunction with existing Fifth Circuit precedence to realize the err of the District Court.

Consequently, the Eleventh Circuit's application of *Owen* to the case at bar only solidified its own prior precedence, on the same issue, and was not a retroactive application of a new principle announced in *Owen*.

Furthermore, what the City is attempting to argue is that they had a right to rely on immunity as a basis for conducting unconstitutional acts. This is simply a ludicrous misconception. Immunity is a defense, which, of course, could be raised affirmatively, however, it is not a right, which can be relied on as a basis of conducting unconstitutional acts. The City had no right to act arbitrarily and capriciously nor to enact an unconstitutional ordinance in reliance upon any qualified immunity, which might have existed prior to *Owen*.

Summarily, if the City's argument is that they had a right to rely on qualified immunity, *vel non*, which existed prior to *Owen*, they are in err once again because Fifth Circuit precedence dating back to 1975 refused to extend qualified immunity based on the good faith of officials to governmental entities. *Owen v. City of Independence, supra.*, at 635, n.15; *Hander v. San Jacinto Jr. College*, 519 F.2d 273 (CA5), rehearing denied, 522 F.2d 204 (1975).

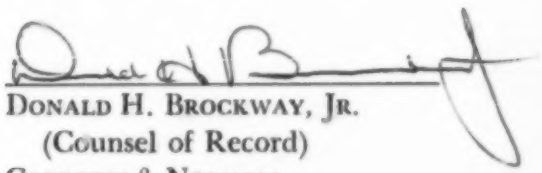
Finally, and assuming arguendo that the petitioners are in a posture to question the retroactive application of *Owen*, the respondents respectfully submit that it should be given retroactive application in light of the great purpose that will be served by the decision; the lack of reliance which has been placed by the City of Pleasant Grove upon any existing qualified immunity, *vel non;* and the positive effect that it will have on the administration of justice in the case at bar and the deminimus effect that it would have on the administration of justice in cases generally.[3]

[3]See generally annotation United States Supreme Court Views As To Retroactive Effect On Its Own Decisions Announcing New Rules, 22 L.

## CONCLUSION

For the foregoing reasons, it is eminently clear that the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals should be denied.

Respectfully submitted,



DONALD H. BROCKWAY, JR.
(Counsel of Record)
CORRETTI & NEWSOM
1804 7th Avenue North
Birmingham, Alabama 35203
(205) 251-1164

*Attorneys for Respondents*

---

Ed. 2d 281; see generally *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748; *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Heritage Homes of Attleboro, Inc. v. The Seekonk Water District*, 648 F.2d 761 (1st Cir. 1981); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *McGhee v. Draper*, 639 F.2d (10th Cir. 1981); *Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3rd Cir. 1980); *Huemmer v. Mayor and City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980); *Rodriguez v. Board of Education of Eastchester Union Free School District*, 620 F.2d 362 (2d Cir. 1980). (The first case referred to above is from This Court and the remaining cases are from the United States Courts of Appeals across the country except for the Seventh and Sixth Circuits. Each appears to recognize generally the retroactive application of *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).)